

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0296

Use Tax

For Tax Years 1995 through 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax—Out of State Sales Tax Collected in Error

Authority: 45 IAC 2.2-3-16; 45 IAC 2.2-3-20; Information Bulletin # 31

Taxpayer protests imposition of Indiana use tax when it was charged Kentucky sales tax in error.

II. Use Tax—Rented Office Space

Authority: 45 IAC 2.2-4-9; 45 IAC 2.2-4-10

Taxpayer protests imposition of use tax on a trailer it rented as temporary office space.

III. Use Tax—Lump Sum Contracts

Authority: 45 IAC 2.2-1-1; 45 IAC 2.2-3-8; 45 IAC 2.2-3-9; 45 IAC 2.2-3-12

Taxpayer protests imposition of use tax on materials used in telephone system installation.

STATEMENT OF FACTS

Taxpayer operates several banks in Indiana. The Department conducted an audit for the years in question, and issued several proposed assessments. Taxpayer protests three of the proposed assessments. Further facts will be provided as required.

I. Use Tax—Out of State Sales Tax Collected in Error

DISCUSSION

Taxpayer protests the imposition of Indiana use tax on items for which it was charged Kentucky sales tax. The Department assessed Indiana use tax on these items because they were delivered in Indiana, and Indiana use tax was due but not charged. 45 IAC 2.2-3-20 states:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [45 IAC 2.2-3-19] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Taxpayer purchased tangible personal property from a Kentucky vendor for storage, use or consumption in the state of Indiana. The purchases were subject to Indiana use tax, as explained in 45 IAC 2.2-3-20.

The vendor charged Kentucky sales tax, even though the tangible personal property was delivered to the purchaser for use in Indiana. Taxpayer believes that it is due a credit for sales tax paid to the other state, under 45 IAC 2.2-3-16, which states:

Liability for Indiana use tax shall be reduced by a credit for the amount of any sale, purchase, or use tax paid to any other state, territory or possession of the United States with respect to the tangible personal property on which Indiana use tax applies.

The Department refers to sales tax Information Bulletin # 31, Section II-B, which explains in relevant part:

A person is entitled to a credit against the Indiana use tax which is equal to the amount of sales tax, purchase tax, or use tax properly and validly paid to another state, territory, or jurisdiction of the United States for the acquisition of a particular item of property. No credit will be allowed if the tax was paid in error to another state and was not due that state.

Information Bulletin # 31, dated January 31, 1986, clearly explains that the credit described in 45 IAC 2.2-3-16 is not available when tax is paid to another state in error. Indiana use tax was due on the purchases as described in 45 IAC 2.2-3-20. Taxpayer has not established that Kentucky sales tax was properly due, therefore 45 IAC 2.2-3-16 does not apply in this case.

FINDING

Taxpayer's protest is denied.

II. Use Tax—Rented Office Space

DISCUSSION

Taxpayer protests the imposition of use tax on rented office space. The rental space was a trailer, which was a purpose-built mobile banking facility, used by taxpayer as a temporary branch. The Department assessed use tax on the rental fees paid, on the basis that the office space was in a trailer that was not situated in place. The Department based its decision on 45 IAC 2.2-4-9, which states in part:

For purposes of the state gross retail and use tax, an “accommodation” is any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated personal or real property (including land), which is intended for occupancy by human beings for a period less than thirty (30) days including:

- (1) Rooms in hotels, motels, lodges, ranches, villas, apartments or houses.
- (2) Gymnasium, coliseums, banquet halls, ballrooms, or arenas, and other similar accommodations regularly [*sic.*] offered for rent.
- (3) Cabins or cottages.
- (4) Tents or trailers (when situated in place).
- (5) Spaces in camper parks and trailer parks wherein spaces are regularly offered for rent for periods of less than thirty (30) days.
- (6) Rooms used for banquets, weddings, meetings, sales displays, conventions or exhibits.
- (7) Booths or display spaces in a building, coliseum or hall.

The Department decided that the trailer was not situated in place, since taxpayer was unable to provide documentation establishing that the wheels had been removed and the trailer placed on blocks.

As part of this protest, taxpayer provided a lease describing the trailer as a “Modular Bank Facility”. The lease contained a section that described the foundation that would be required for the facility. The lease also explained that the wheels used to move the facility were the property of the lessor and would be removed after delivery.

45 IAC 2.2-4-8(b) provides:

In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

Since the facility was situated on a foundation, the facility was situated in place as required by 45 IAC 2.2-4-9(4) to qualify as an accommodation. Since the accommodation was rented for eleven months, 45 IAC 2.2-4-8(b) provides that the facility is not subject to the gross retail tax.

FINDING

Taxpayer's protest is sustained.

III. Use Tax—Lump Sum Contracts

Taxpayer protests the imposition of use tax on the materials used in improvements to realty at one of its branch offices. Taxpayer paid Kentucky sales tax on the materials used in improvements to realty. The Department imposed use tax on the materials portion of the amount charged, but not on the labor amount. For reasons previously discussed, the credit described in 45 IAC 2.2-3-16 does not apply in this instance. In the alternative, taxpayer asserts that the contract called for a lump sum and the materials are therefore not subject to use tax. Taxpayer states that it did not issue exemption certificates to the contractor.

The Department refers to 45 IAC 2.2-3-8, which states:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.
- (b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [45 IAC 2.2-5])

The Department also refers to 45 IAC 2.2-1-1(a), which states:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be collected in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Taxpayer refers to 45 IAC 2.2-3-12(e), which states:

A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

The Department refers to 45 IAC 2.2-3-9(d), which states in relevant part:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

- (1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor or other charges (only the gross proceeds from the sale of the construction materials are subject to tax)

...

Taxpayer states that the contracts were lump sum contracts, and as such the materials are not subject to use tax. Taxpayer misunderstands the regulations. 45 IAC 2.2-3-12(e) does not state that if the sale of materials is not separately stated from the sale of labor then the sale of materials is not taxable. Rather, 45 IAC 2.2-3-12(e) provides that only materials will be taxed as long as materials are a separately identifiable transaction from labor. In either case, materials are taxable. 45 IAC 2.2-3-9(d) provides that a person making a time and material contract for the conversion of materials into realty on land he does not own must collect sales tax.

The Department has reviewed the documentation supplied by taxpayer, and has found that some of the invoices show that the contractor charged sales tax and incorrectly remitted it to Kentucky. The fact that the contractor charged sales tax indicates that he considered the materials to be taxable at the time of taxpayer's purchase. For reasons previously discussed, the sales tax was incorrectly collected and remitted to Kentucky, and Indiana use tax is due. The other invoices showed that materials were used and no sales tax was charged, therefore use tax is due.

FINDING

Taxpayer's protest is denied.

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